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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

CARLTON SMITH,
Petitioner,

vs.

MORRIS THIGPEN, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

(1) Whether the Petitioner was denied his Sixth and Fourteenth Amendment rights to the assistance of counsel.

(2) Whether the Petitioner was denied his Sixth and Fourteenth Amendment rights to the effective assistance of counsel.

(3) Whether the evidence presented by the State could not, as a matter of due process, reasonably have led a jury to conclude the Petitioner was guilty of the crime charged beyond a reasonable doubt.

LIST OF ALL PARTIES TO THE PROCEEDINGS

1. Carlton Smith
2. Morris Thigpen, Commissioner, Mississippi Department of Corrections
3. Eddie Lucas, Warden, Mississippi State Penitentiary
4. William B. Allain, Attorney General, State of Mississippi.

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REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

No opinions have been reported.

STATEMENT OF GROUNDS UPON WHICH JURISDICTION IS BASED

The Petitioner seeks to review the judgment of the United States Court of Appeals for the Fifth Circuit dated and entered April 11, 1985.

There was no Petition for Rehearing filed.

The statutory provision providing this court to review the above mentioned judgment is 28 U.S.C., Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions which were relevant to the decision in this case are the Sixth and Fourteenth Amendments to the Constitution of the United States.

The Sixth Amendment to the United States Constitution provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and District wherein the crime shall have been committed, which District shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment, Section 1, provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Memphis Radio Telephone Company (MRT), a business constructing and operating mobile radio telephone operations, believed a market existed in North Mississippi for proposed radio telephone service permitting direct telephone communication with automobiles, trucks or farm equipment. Batesville Radio Telephone Company, Inc. (BRT) was organized with MRT owning one-half of the capital stock and three local investors owning the other half. BRT agreed to purchase its equipment through MRT's affiliated companies. An application for Certificate of Convenience and Necessity was made to the Mississippi Public Service Commission although the Commission never ruled after two hearings.

On February 22, 1974, BRT borrowed $18,720.00 from the Bank of Batesville. The note was secured by Braswell, Hudson and Pointer and BRT. The money was deposited in the BRT account and a check was drawn on that account payable to CMC in the sum of $18,720.00. Braswell, the president, signed it and the Petitioner signed as secretary.

In late Spring 1974, the Bank of Batesville asked for more collateral. Pursuant to this request, BRT gave the Bank inventory totaling $18,720.00.

The Petitioner was prosecuted and indicted with the State maintaining that the check to CMC was to purchase an automatic terminal. The Petitioner contended the purpose was to finance inventory in the possession of BRT. Petitioner was indicted for embezzlement and forgery on October 15, 1975.

The Court appointed Attorney William Cook and later substituted Attorney William Kirksey who served as attorney for the Petitioner. Mr. Kirksey withdrew as Petitioner's attorney and then Robert Clark and Ben Cole were appointed. Continuance was received until the October term of Court. On or about October 12, these attorneys attempted to remove the case to the United States District Court under 28 U.S.C. 1443.

The case was remanded October 17, 1977. Petitioner's case was re-set for trial on April 17, 1978.

On April 14, 1978, the Petitioner retained the services of John B. Farese as defense counsel. Clark and Cole moved for leave to withdraw. Clark and Cole were cited for contempt for delay. A new trial date of October 16, 1978, was set.

On April 9, 1978, an attorney of the Greenville Bar, Robert E. Brock and later T. G. Freeland, proceeded in the United States District Court seeking to enjoin the State criminal proceedings. Farese did not appear in the Federal action. The United States District Court denied the Motion to Enjoin on October 12, 1978.

The case was tried and a mistrial was entered October 21, 1978, the jury being unable to agree on a verdict. Farese advised the Petitioner that the State would not try him again even though the Assistant District Attorney told Farese he would. Farese verbally told Judge Baker and Assistant District Attorney that he would no longer represent Petitioner but filed no motion to be relieved as counsel nor did he tell Petitioner of his intentions to withdraw.

On November 1, 1978, Farese indicated by mail that he would not participate in the case any further. Petitioner, believing that he had Farese hired for all criminal matters, wrote Farese November 7, 1978. On November 16, 1978, Farese informed the Petitioner that he had no agreement to represent him regarding the three indictments and told Petitioner he could make arrangements for other counsel.

On March 2, 1979, Judge Baker wrote Petitioner with copy to Farese indicating trial was set April 12, 1979. Judge Baker testified later that he was not sure Farese was out of the case.

On March 6, 1979, Farese wrote Petitioner with copy to Baker saying that he was going to withdraw. The Petitioner wrote Farese on April 2, 1979, expressing shock at Farese's ex-

pectation that he would have obtained other counsel. Petitioner indicated to Farese that under the financial circumstances he was unable to employ anyone else.

Petitioner's friend, Tarrence B. Miller, also wrote Farese on March 31, 1979, indicating that he, too, thought Farese understood the financial arrangements as Petitioner has no finances. He asked for an appointment with Farese, calling attention to the April 12, 1979, trial date. On April 4, 1979, Farese wrote Miller and Petitioner insisting that he had been paid for all that he had promised and on April 7, 1979, Miller wrote Farese again indicating that Farese should live up to the defense of Smith and that he was looking to him to be with Smith for the completion of the case. Farese did not reply. Judge Baker sent Petitioner another letter on April 9, 1979, indicating the Petitioner's case was set first up at 9:00 a.m. April 12, 1979. Petitioner wrote Judge Baker on April 10, 1979, indicating that until March 6 and April 4, 1979, he was not aware Farese would definitely not represent him in the criminal proceedings as Farese's letter of November 1, 1978, was captioned with the Federal Civil Action number. The Petitioner at that time made no attempt to obtain an attorney and the first day of his trial was on April 12, 1979. Petitioner came to the Courthouse with his friend Miller and filed a motion for continuance pro se which was denied by the Court.

On the same morning Attorney Farese arrived at the Courthouse and conferred with Judge Baker out of the Petitioner's presence and moved ore tenus to be relieved in all three cases and the Judge granted and entered a written Order relieving him as counsel. This was on the morning of the day of the trial. Petitioner then called his civil attorney, Freeland, who could not come to his assistance, but who suggested Edwin Roberts. Petitioner was forced to go to trial without counsel and had to conduct the voir dire of the jury and select the jury in his case by himself. At noon that same day Roberts, who had been in practice six or seven years and had never tried an embezzlement or

white collar crime case, entered his appearance. He moved for a continuance of the case on the grounds of total unpreparedness which the Court promptly denied. The jury brought in a conviction on April 17, 1979, and sentence was $1,000.00 fine and eight (8) years in the Mississippi Department of Corrections.

On April 20, 1980, pursuant to 28 U.S.C., Section 2254, the Petitioner moved for a Writ of Habeas Corpus and on February, 1982, the United States Magistrate admitted the Petitioner to bail. An evidentiary hearing before United States Magistrate was held on April 20, 1982, and the Magistrate's Report and Recommendations were entered January 30, 1984, that the Petition for Habeas Corpus be denied. On June 27, 1984, the United States District Court adopted the findings of the Magistrate. On July 9, 1984, the United States District Court issued a certificate of probable cause for appeal. On appeal, the Fifth Circuit affirmed the decision of the District Court.

The Petitioner asserted his right to counsel before and during his trial in State Court. (R.21, 39, 70, 72, 73). The Mississippi Supreme Court ruled against Petitioner on these issues. The Petitioner preserved his right to assert the verdict was so against the weight of the evidence as to amount to deprivation of due process of law by Motion for New Trial and appeal to the Mississippi Supreme Court which affirmed his conviction on February 11, 1981.

REASONS FOR GRANTING THE WRIT

We believe this case furnishes the Court distinct and insurmountable issues to be resolved in order to protect the constitutional rights of the Petitioner herein. The Petitioner takes the position that he is entitled to a fair and impartial trial with effective counsel. The Petitioner was denied his constitutional rights under the Sixth and Fourteenth Amendments to the United States Constitution by the trial court refusing to allow him a continuance or appointing him counsel to defend himself in a trial which, if convicted, could result in loss of his liberty.

Petitioner's point number two addresses the issue that the Petitioner was entitled to effective counsel adequately prepared. The Petitioner's counsel when obtained half way through the trial had absolutely no preparation to try the case, did not know all the facts and law involved. Effective counsel encompasses the concept that the counsel must have had time to research the law and investigate the facts and confer with this client in order to adequately advise and conduct the trial proceedings.

ARGUMENT

I.

In *Powell v. Alabama,* 387 U.S. 45 (1932), the Supreme Court held that a criminal defendant "...requires the guiding hand of counsel at every step in the proceedings against him," *Id.* at 60, and the due process of law was not satisfied "...by the assignment (of counsel) at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case." *Id.* at 71; See also *Gideon v. Wainwright,* 372 U.S. 335 (1963); *Argersinger v. Hamlin,* 407 U.S. 25 (1972).

Further, the Fifth Circuit has explicitly held that the Sixth Amendment right to effective assistance of counsel includes familiarity of counsel with the case and an opportunity to investigate the case in order to meaningfully assist the accused.

Windom v. Cook, 423 F.2d 721 (5th Cir. 1970). Citing *Calloway v. Powell,* 393 F.2d 886, 888 (5th Cir. 1968); *Gandy v. Alabama,* 569 F.2d 1318, 1321 (5th Cir. 1978).

The Court in *Gandy* considered a denial of a continuance on facts which are constitutionally indistinguishable from Petitioner's case. In *Gandy,* on the day of trial, counsel for defendant announced that he would not be present at trial the next day, and he moved for a continuance. The continuance was denied, and the defendant was forced to go to trial with counsel who was completely unprepared and unfamiliar with the case. On these facts, the court held that the trial was rendered fundamentally unfair because the defendant was denied his choice of counsel and was represented by an attorney who was totally unprepared for trial. *Id.* at 1327. The Court was particularly concerned that counsel had abandoned his client to be represented by someone completely unfamiliar with the case: "This blatant breach of the sacred loyalty owed his client was itself such ineffective assistance of counsel as to render this trial fundamentally unfair." *Id.* at 1327. The Court noted that counsel's breach of professional duty to his client did not lessen the defendant's right to effective assistance of counsel, but rather it was a disciplinary matter between the trial court and counsel. *Id.* at 1326, n. 15.

In its discussion, the *Gandy* court cites *Argo v. Wiman,* 209 F.Supp. 299 (M.D.Ala. 1962), aff'd 308 F.2d 674 (5th Cir. 1962) a case which involved a dispute between client and his counsel, similar to the facts of this case. In *Argo,* the government argued that it was the defendant's "fault" that his retained counsel did not appear, because his counsel had told him he would not appear until paid. The Court noted that the attorney had not filed a motion to withdraw and that the problem was a disciplinary matter between counsel and the Court and "not a matter of the trial court's requiring a defendant to go to trial with appointed counsel on short notice." *Id.* at 305. The trial court should have protected the defendant's rights by either

granting a continuance or by taking measures to assure counsel's continued attendance. Its failure to do either constituted an abuse of discretion. *Gandy v. Alabama, supra,* at 1328.

Petitioner in this case was placed in the same untenable predicament as the defendant in *Gandy*. Up until the day of trial, Petitioner relied on the belief that his counsel would be present at trial and would represent him as he had been retained to do. Although there was some dispute as to the terms of this representation, Petitioner consistently, throughout his correspondence with counsel, insisted that his retained counsel represent him in the second trial. Indeed, counsel was notified on April 7, 1979, by Terrence Miller, who had paid Petitioner's legal fees, that he was expected to represent Petitioner at trial on April 12, 1979. Even with written notice, only five days prior to trial, that his client was depending on his services, counsel did not respond to Mr. Miller's letter and did not file a motion to withdraw. Petitioner did not know that his counsel Farese intended to withdraw from the case until Farese formally moved the Court to approve his withdrawal on the morning of the trial. Both notice to client and leave of court are required under Mississippi law for withdrawal of counsel, see *Fairchild v. General Motors Acceptance Corporation,* 179 So. 185, 187 (5th Cir. Miss. 1965), and Petitioner specifically relied on this rule and his counsel's ethical duties. As Petitioner testified at his evidentiary hearing, and as indicated in the correspondence between him and Farese, Petitioner believed that he was in a fee dispute with Farese and that, until Farese moved to formally withdraw from the case, that Farese was the counsel of record and Petitioner could rely on his representation. Counsel's conduct was a serious breach of his professional and ethical duties to his client. (The Mississippi Rules of Court, Rule 1.11; The American Bar Association Code of Professional Responsibility, DR 2-110).

Thus, the Court in this case was confronted with essentially the same problem as the trial court in *Gandy*. On the day of

trial, the Court was presented with the motion to withdraw and was informed of the dispute between Petitioner and his counsel. The options available to the judge were exactly those in *Gandy:* (a) he could have denied the motion to withdraw; or (b) he could have granted a continuance to allow Petitioner to obtain other counsel. Instead, he granted the motion to withdraw out of Petitioner's presence without ever inquiring into Petitioner's side of the dispute, and then forced him to begin trial and even voir dire the jury with no counsel at all. Petitioner was able to retain counsel during the luncheon recess, and his new counsel again moved for a continuance because he had been retained only thirty minutes before and knew nothing about the case. Again, the motion for continuance was denied, forcing Petitioner to trial in a complex case with such counsel is, standing alone, a violation of fundamental Sixth Amendment rights. See *Powell v. Alabama, supra; Windom v. Cook, supra; Gandy, supra; United States v. Knight,* 442 F.2d 174 (6th Cir. 1971) ("Prejudice inherent" in case where counsel allowed only thirty minutes to prepare); *Wolfs v. Britton,* 509 F.2d 304 (8th Cir. 1975) (appointment of counsel 1½ days before trial precluded effective assistance of counsel).

Gandy instructs clearly that, in cases such as Petitioner's the trial court must take measures to insure that the defendant is afforded effective assistance of counsel, and that fundamental constitutional guarantees are not sacrificed merely for "traditional interests of judicial economy." *Id.* at 1328. Here, the Court, at every juncture, insured that Petitioner would in effect have no counsel at all. Thus, the denials of the motions for continuance were obvious and prejudicial abuses of discretion, entitling Petitioner to relief.

II.

Petitioner contends that the Court erred in not granting him habeas corpus relief when no reasonable jury could have found Petitioner guilty of the crime of embezzlement beyond a

reasonable doubt. Petitioner further contends that he was charged with and convicted of a crime which involved nothing more than a commercial transaction and which at worst, amounted to a breach of contract; under *Jackson v. Virginia,* 433 U.S. 307 (1979), Petitioner must be granted habeas corpus relief since no reasonable jury could have determined beyond a reasonable doubt that he had committed any crime.

There is no dispute that on February 22, 1974, Petitioner, along with the President of BRT, Braswell, obtained a loan from the Bank of Batesville in the amount of $18,720.00. However, the State submitted that the purpose of the loan was for partial payment for an automatic telephone answering terminal, which BRT proposed to buy from CMC Corporation in which Petitioner owned an interest.

There is also no dispute that after having obtained the loan, BRT wrote a check in the amount of $18,720.00 to CMC. The BRT check, signed by both Petitioner and Braswell, was transferred to CMC. Again the State submitted that this check was to be a down payment on the answering terminal. There was never any contention by the State that the relationship between BRT and CMC was other than parties to a simple contract, or debtor creditor. Nor was there any claim that CMC was acting as a trustee, agent or subsidiary of BRT. Rather, according to the state a simple exchange was contemplated.

According to the State, BRT never got its answering terminal although it did get other equipment. Much of the State's evidence was devoted to showing how CMC spent the money it received, but the State introduced no evidence whatsoever that, at the time the transfer took place, CMC or Petitioner was acting as an agent or trustee of BRT. Indeed the evidence introtroduced by the State showed the contrary, that CMC had nothing but a debtor-creditor relationship with BRT. According to the State, the case came down to the failure of CMC to provide equipment it had agreed to furnish.

Embezzlement requires proof beyond a reasonable doubt of four distinct elements, to wit:

1. That the defendant is the agent or trustee of another;
2. That defendant converts to his own use;
3. Money or other valuable property of another; and
4. That is entrusted to his care by virtue of his position or employment.

Temple v. State, 288 So.2d 835 (Miss. 1974); *May v. State,* 240 Miss. 361, 127 So. 423 (1961). Petitioner contends the State failed to prove each of these elements of the crime charged; and Petitioner submits the undisputed evidence shows that as to certain elements, the State proved the contrary.

The question whether the State has proved its case beyond a reasonable doubt, is in the first instance, a question for the jury. But the Supreme Court has held that the beyond a reasonable doubt standard, rooted in the Constitution as it is, requires in certain instances that a Court determine whether the jury acted rationally in finding the defendant guilty beyond a reasonable doubt. As the Court has found, "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." *Jackson v. Virginia,* 443 U.S. 307, 317 (1979). Given that possibility, and in light of the constitutional standard, the Supreme Court has held that federal habeas corpus relief will be available to a state prisoner if "the evidence in support of his state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find guilt beyond a reasonable doubt." *Jackson v. Virginia, supra* at 321. Furthermore, the court in *Jackson* held that neither considerations of comity nor the availability of State review on sufficiency of the evidence grounds are a reason to preclude such federal review. It is precisely Petitioner's contention here that "no rational trier of fact could have found proof of guilt beyond a reasonable

doubt" so that habeas corpus relief is required. *Jackson v. Virginia, supra* at 324.

It is Petitioner's contention, moreover, that even under the standard of review prior to *Jackson,* that habeas relief is unavailable unless there be "no evidence" supporting the conviction, *Thompson v. Louisville,* 362 U.S. 199 (1960) he could nevertheless prevail. For as he shows, the State failed to prove all the elements of embezzlement. It failed to show that the property Petitioner is alleged to have embezzled belonged, at the time of its alleged conversion, to BRT. It failed as well to show that Communications Media Corporation was in a position of "trust" for BRT, or acting as an agent for it; on the contrary, the evidence showed nothing other than a debtor-creditor relation. The failure to provide sufficient proof of an element necessary to make out the offense is grounds for granting the writ of habeas corpus. See, *Holloway v. McElroy,* 632 F.2d 605, 640-41 (5th Cir. 1980).

The classic instance of embezzlement occurs when someone working with the funds of another - a bank teller, a bookkeeper - converts the funds to his own use. The essence of the crime is misuse of funds of another *entrusted* to one (26 Am.Jur.2d *Embezzlement* Section 9). Embezzlement does *not* occur, however, where, after title to funds of property has lawfully been transferred from one person to another, the recipient of the funds or property fails to comply with a contractual obligation. *Id.* Rather, to make out the crime of embezzlement, title or ownership of the property must remain in the "victim". Once that property has been transferred in exchange for other property or services, there can no longer be embezzlement. This debtor-creditor relationship can never be sufficient for a finding of guilt, for "a prosecution for embezzlement is not an action to determine whether defendant, who has the ownership of property, is indebted to another with respect to that property." 26 Am.Jur.2d Embezzlement Section 9 at 559.

The cases interpreting the crime of embezzlement bear this analysis out in a variety of contexts. In *Moore v. State,* 49 So.2d 415 (Miss. 1950), defendant Moore entered into an agreement to sell a quantity of wood to one Trawick. When the contract was made, Trawick paid Moore $1,060.00, which Moore was to use to obtain the wood; the balance was to be paid upon delivery. Moore never performed his part of the contract and was prosecuted for embezzlement on the theory that, having received the $1,060.00, he was the "agent" of Trawick because Moore was supposed to use the money paid to him by Trawick to obtain the wood for eventual sale to Trawick. The Court reversed Moore's conviction, however, explaining that the two individuals had a debtor-creditor relationship and nothing more. Trawick had, to be sure, given money to Moore to be used for a specific purpose, but that transfer was pursuant to a contract, and title to the funds had passed to Moore. Trawick had an action for breach of contract (and, if supporting facts existed, for fraud), but there could be no embezzlement growing out of a sale and transfer of funds. Simply labeling Moore as Trawick's "agent" could not obscure the relationship as debtor-creditor, with title to the money lawfully in Moore. The Court thus concluded: "Under these circumstances Moore was not the agent of Trawick and the money paid by Trawick upon the purchase price of the pulpwood was the property of Moore-not that of Trawick." 49 So.2d at 416. Trawick, of course, was not without a remedy, since a breach of contract had occurred. That hardly justified a prosecution for embezzlement: "Moore violated his oral agreement to pay his vendors, and may be, and apparently is civilly liable to Trawick when the accounts are balanced, but he is not guilty of embezzlement. Whether he may be guilty of any crime other than embezzlement is not before us." *Id.*

Moore is directly on point here. Title to the funds at stake here were lawfully transferred from Batesville Radio Telephone Corporation to Communications Media Corporation through the check written from BRT to CMC. The BRT check was

made payable to CMC, delivered simultaneously to CMC, negotiated by CMC, and deposited in a CMC bank account. After the check was cashed and placed into the CMC account those funds belonged to CMC. Furthermore, the State acknowledged that the reason for the transfer of the assets was for a contractual exchange: in consideration for the money, CMC would supply certain equipment. The fact that one side had partially performed the contract, through its down payment does not mean that the failure of the other side to perform constitutes embezzlement. Indeed, the very premise upon which the State prosecuted Petitioner — that the money was a down payment on the equipment, presumably making Petitioner an agent through CMC — was specifically rejected in *Moore*. There, too, a down payment was made; and, indeed, the evidence in *Moore* was stronger for an agency theory, since the evidence showed that the down payment was to be used by the seller to obtain the very goods he was to supply to the buyer. But even that relationship did not convert the seller to an agent. Thus, here, the title to the funds having passed, neither CMC nor Petitioner can be said to have been dealing with the property of another. The funds belonged to CMC, and as the Supreme Court of Mississippi has held, "one cannot embezzle ones own property." *Sisk v. State,* 260 So.2d 485, 486 (Miss. 1972); cf. *State v. Hampton,* 99 Miss. 176, 54 So. 722 (1911) ("an indictment for embezzling the funds of one cannot be sustained by proof that the funds belonged to another.")

To similar effect is *Lawson v. State,* 125 Miss. 754, 88 So. 325 (1921). There defendant entered into an agreement with the Church to construct a building for a certain sum of money. The defendant requested, and received funds with which to purchase the materials. Instead of obtaining the materials, the defendant absconded, keeping the money. He was eventually caught and found guilty of embezzlement, but the Mississippi Supreme Court reversed his conviction.

The Court found that the Church had contracted with the defendant to construct the building, so he could not be acting as

an agent or trustee. The fact that he had been given a specific amount of money to be used for a particular purchase was of no legal consequence, since the agreement as a whole was contractual. The Court concluded: "Therefore the fiduciary relationship, or relation of trust, essential to the embezzlement, never existed between the parties. The money was paid to appellant as the contractor, for which he became liable civilly, but not criminally, which the plaintiff appropriated to his own use." 125 Miss. at 761-62. Here, too, the most that can be said is that Petitioner and CMC failed to deliver what it contractually agreed to deliver. *Lawson* establishes without a doubt that such conduct is not embezzlement.

In *Grantham v. State,* 384 So.2d 523 (Miss. 1973), the same principle was applied. Grantham, a cattle dealer, contracted to buy a load of cattle for a stated price, and the cattle were delivered to him. The seller, previously having difficulty obtaining payment from Grantham, had insisted upon payment upon delivery, but, through various representations, Grantham managed to obtain delivery on credit. The Court again found a contractual relationship, not one in which the cattle was placed in Grantham's trust; the relationship, again, was buyer and seller. Thus, the State "totally failed to prove a wrongful conversion or appropriation of another's property lawfully possessed by the defendant." 284 So.2d at 524.

Howington v. State, 256 So.2d 382 (Miss. 1972), sheds additional light on the nature of the embezzlement offense. In that case, the defendant, Howington, borrowed an automobile from one Newman and left $200 as a guarantee for its return. The parties further agreed, however, that if Howington did not return the car within 30 minutes, the $200 check could be cashed. There was no explicit agreement, however, that in the absence of the car's return, a sale would go through at the $200 price. The defendant did not return the car in 30 minutes as agreed. Newman, who owned the car, then cashed the check, which bounced. Howington was then prosecuted for embezzle-

ment on the theory that he had converted the automobile to his own when it was entrusted to him by Newman.

The Supreme Court of Mississippi reversed Howington's conviction. It found particularly relevant the testimony of Newman that had the check cleared, the matter would have been over. From the evidence, along with other testimony, the Court concluded "that there was a sale of the automobile to defendant by Newman, and that this sale is evidenced by the exchange of the check in the amount of $200." 256 So.2d at 384.

Howington is especially significant because the debtor-creditor relationship was not, as here, explicit. An argument could be made, after all, that the defendant was only borrowing the car, and that the $200 he left did not represent anything more than a deposit. But the Court refused to adopt this analysis, recognizing that the criminal law should not intrude into normal buyer-seller relationships. See *Temple v. State,* 288 So.2d 835 (Miss. 1974).

To similar effect is *Fairchild v. State,* 258 So.2d 254 (Miss. 1972). In that case, the defendant was a gas station operator, who rented the station from and paid gas charges to an oil supplier. According to the agreement between the oil company and the station operator, gasoline meters would be read weekly by the supplier and the operator would be billed immediately thereafter. At the trial, the evidence showed that three checks the operator issued were returned for insufficient funds. He was then indicted for and convicted of embezzlement.

The Mississippi Supreme Court, however, reversed his conviction. Although the Court used the same form of analysis as in the prior cases — focusing on the independence of the operator from the supplier — its discussion is illuminating because of its concentration on the trust/agency element of embezzlement, rather than looking to the ownership of the property. It recognized that the operator of the station "owed them for this gasoline just as any other debtor would owe any

other creditor. All that concerned (the supplier) was being paid each week for the gasoline sold Fairchild the preceding week". 258 So.2d at 256. Thus, the Court concluded: "The evidence clearly shows that the intention of the parties was that the business was Fairchilds to run as he saw fit, that (the supplier) would sell him gasoline at wholesale and that he would pay them promptly each week when they billed him." *Id.* The Court concluded, therefore, that Fairchild was not an agent of the supplier, so he could not be guilty of embezzlement.

It is evident from the Court's analysis in *Fairchild* and the other cases that the person alleged to have embezzled must have someone else's property and be acting on behalf of that person. But if the transaction is basically a seller-buyer transaction, an agency or trust relationship does not exist since once title passes, the property is no longer "entrusted". However viewed, the crime of embezzlement does not exist.

Fairchild, too, shows that the only way Petitioner could have embezzled anything from BRT is if he had been given funds still lawfully belonging to BRT to make a purchase on its behalf; but the undisputed evidence showed an agreement for another corporation — one in which Petitioner did not even have a controlling interest — to supply the piece of equipment. There was no agency; there was no entrusting; there were no funds to which BRT had any interest in or control of. Thus, embezzlement is not established by the conduct charged of Petitioner.

One additional case emphasizes the defect in the State's proof here. Had there been any evidence to support an allegation that Petitioner embezzled any money from anyone (there was none) the offense would have to have been committed against CMC. Petitioner was, after all, entrusted with CMC funds: he had authority to spend its funds; and he was in lawful possession of the funds which belonged to CMC.

In this respect *State v. Jones,* 102 Miss. 89, 58 So. 782 (1912) is instructive. In that case, a public official was indicted for

embezzling county funds for allegedly having kept a fine a citizen paid to him when the citizen owed the county government. There was no allegation, however, that the title to the funds ever passed to the county. As the Court observed, if there was any embezzlement at all, it would have been from the citizen who paid the fine, since the money never legally belonged to the county. This case is cited, of course, not to suggest that Petitioner converted money from anyone, but for the proposition that the property embezzled must belong to the person or institution from which it was taken. In this case, having transferred the proceeds of the loan to CMC, Batesville Radio Telephone Corporation had no right, title or interest in that money. It did have a right of action for breach of contract against CMC if performance was not forthcoming. That, however, was all it had.

As in *Moore, Lawson, Grantham, Howington* and *Fairchild,* an embezzlement case was brought for, at most, a breach of contract. The criminal law was never intended to intrude into commercial relationship of debtor and creditor unless there is some allegation of fraud — and there certainly was none here.

Furthermore, in order to prove embezzlement, it is elementary that there must be proof of an actual loss or deprivation of property of the "victim". This fundamental aspect of embezzlement is usually the gravaman of the offense. If there has been no deprivation, there is nothing to prosecute.

But in this case, the victim of the embezzlement, on the prosecution's own evidence, lost nothing. That evidence showed that, when the original loan of the Bank of Batesville was obtained by BRT, it listed as security equipment belonging to CMC valued at the precise amount of the loan, $18,720.00. Thus, even accepting the highly disputed contention of the State that the purpose of the loan was to obtain an automatic answering terminal and not the equipment actually provided by CMC, nevertheless BRT received goods appraised at precisely the value of its loan.

Thus, regardless whether the purchase of the automatic answering terminal went through, BRT had lost nothing. There was an arguable breach of contract, but nothing more.

The case of *State v. Howington, supra,* is again closely on point, and it involves transactions similar in structure to the one here. As in that case, the original security — in that case $200 to guarantee the return of a borrowed automobile — may not have been intended as part of a sales transaction. But when circumstances transformed the transaction into a sale, there can be no proper claim of conversion since there had been an exchange. Even where there was a failure of consideration in that exchange — in *Howington* the check bounced — there was still no proof of conversion. Similarly here, whether the value of the secured property obtained by Batesville Radio Telephone Corporation was, as the State contended at trial, less than the amount of the loan, the fact is that the exchange took place. Hence, no conversion existed. Certainly, there is nothing in the criminal law which permits a commercial entity to prosecute a party with whom it has made a bad bargain.

Petitioner has committed no crime. No rational jury could have found him guilty of having committed one. Thus, he is entitled to habeas corpus relief.

CONCLUSION

Petitioner respectfully submits that a review of the record would indicate that this Petition for a Writ of Certiorari should be granted, and that the judgment of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the District Court should be set aside and the relief granted.

Respectfully submitted,

ALVIN M. BINDER
511 East Pearl Street
Post Office Box 25
Jackson, Mississippi 39205
Counsel for Petitioner

CERTIFICATE OF SERVICE

The undersigned counsel for Petitioner certifies that three (3) true and correct copies of the foregoing Petition for Writ of Certiorari have this day been mailed by United States Mail, postage prepaid, to Honorable Rex E. Lee, Solicitor General, Room 5143 Main Justice Building, Washington, D. C. 20530.

This the 10th day of May, 1985.

ALVIN M. BINDER

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4471

CARLTON SMITH, No. 49225,
Petitioner-Appellant,

versus

MORRIS THIGPEN, ET AL.,
Respondents-Appellees.

Appeal from the United States District Court for the Northern District of Mississippi

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(April 11, 1985)

Before WISDOM, TATE, and DAVIS, Circuit Judges.*

PER CURIAM:

Smith, a Mississippi state prisoner, appeals from the dismissal, after evidentiary hearing, of his habeas corpus petition. 28 U.S.C. § 2254. He contends that he was denied his Sixth and Fourteenth rights to counsel and to effective assistance of counsel, and, further, that the evidence at the state guilt-trial could not support a reasonable jury's verdict of guilty of embezzlement beyond a reasonable doubt.

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

In his 84-page opinion, after evidentiary hearing, the magistrate analyzed the evidence as to the petitioner's complaints of lack of counsel and the state court's failure to grant a continuance to secure one, as well as the decisional law relevant to the issues so raised. The magistrate essentially found that Smi was aware long in advance of the trial that his attorney (w had been retained and had represented him in a first trial, ending in mistrial) was not going to represent him at this second trial, but that, although so informed, he neglected to retain counsel. The magistrate's opinion also recited Smith's past history in attempting to delay the trial. The magistrate's recommendations were adopted by the district court, after review of the record. The factual findings so made are not clearly erroneous, and the principles of law therein cited were correctly applied.

We likewise find no factual or legal error in the magistrate's holding that the evidence at the state guilt-trial was constitutionally sufficient, *Jackson v. Virginia,* 443 U.S. 407 (1979), to support the state conviction.

Accordingly, for the reasons more particularly set forth in the magistrate's Report and Recommendations, Jan. 30, 1983, United States District Court, Northern District of Mississippi, Docket No. GC-81-66-WK-0, we AFFIRM the district court's denial of Smith's petition for habeas corpus relief.

AFFIRMED.

X X X

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

OFFICE OF THE CLERK
630 Camp Street
New Orleans, LA 70130

April 30, 1985

Mr. Norman L. Gillespie
Clerk
United States District Court
Greenville, MS 38701

No. 84-4471 - SMITH v. THIGPEN, ET AL
(D.C. No. GC-81-66-WK-0)

____ Enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

____ Enclosed to you only is a certified copy of the Rule 47.6 Decision in the above case issued as and for the mandate.

X The Court having denied the motion for stay of mandate, enclosed to you only is a certified copy of the judgment of this Court in the above case issued as and for the mandate.

____ Having received from the Clerk of the Supreme Court a copy of the order of that Court denying certiorari, I enclose a certified copy of the judgment of this Court in the above case, issued as and for the mandate.

____ We have received a certified copy of an order of the Supreme Court denying certiorari in the above cause.

This Court's judgment as mandate having already been issued to your office, no further order will be forthcoming.

Enclosed herewith are the following additional documents:

_X_ Copy of the Court's opinion.

_X_ Original record on appeal or review. (3 VOLUMES)

____ Original exhibits. (1 BOX) - FWD. UNDER SEPARATE COVER

____ Bill of Costs approved by this Court. ____ Copy enclosed to counsel.

Sincerely,

cc: (Letter Only)
Hon. William C. Keady
Mr. Alvin M. Binder
Mr. William S. Boyd, III

Gilbert F. Ganucheau, Clerk

By: /s/ H. E. Adams, Jr.
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-4471

CARLTON SMITH, No. 49225,
Petitioner-Appellant,

versus

MORRIS THIGPEN, ET AL.,
Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Mississippi

ORDER

(Filed April 30, 1985)

__X__ The motion of appellant for __X__ stay ____ recall and stay of the issuance of the mandate pending petition for writ of certiorari is DENIED.

____ The motion of appellant for __X__ stay ____ recall and stay of the issuance of the mandate pending petition for writ of certiorari is GRANTED to and including _____, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

____ The motion of _____
for a further stay of the issuance of the mandate is GRANTED to and including _____, under the same conditions as set forth in the preceding paragraph.

____ The motion of _____
for a further stay of the issuance of the mandate is DENIED.

_____
United States Circuit Judge